Supreme Court, U.S.
FILED
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No. 92-240

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ROBERT ALLEN MOORE
PETITIONER

V.

THE STATE BAR OF TEXAS
RESPONDENT

On Writ of Certiorari
To The
Supreme Court of Texas

BRIEF OF RESPONDENT

Respectfully submitted,

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STATEMENT OF THE CASE

In or about February 1982, Mark Taylor ("Taylor"), retained as his attorney Robert Allen Moore ("Moore") to represent him in a probate proceeding concerning Taylor's father's estate. (S.F. 40, 41-42, 243-245). While that matter was pending, Moore employed Taylor to work as a paralegal in his law office. (S.F. 40, 45, 247). Through his employment, Taylor and Moore became friends to the extent that they socialized together outside the office. (S.F. 248, 382).

In the spring of 1983, Moore began to suffer financial difficulties. (S.F. 35, 251-252; 384). At this time, Moore was a borrower on notes totalling $500,000

at Metro Bank and Moore admitted that if the bank were closed by the FDIC and the notes were called in, he would not have been able to repay them. (S.F. 35, 51). He felt a great amount of pressure to secure additional funding for his practice. (S.F. 52).

Moore learned that Taylor had two elderly aunts, Mary and Blanche Taylor, who were quite wealthy. (S.F. 253, 383). Moore asked Taylor to help him secure $100,000 and at Moore's suggestion Taylor approached his aunts for the loan. (S.F. 254). A loan for $100,000 was in fact obtained from Texas American Bank of Houston ("TAB") which was secured by a treasury bill in the name of Mary

Taylor and held by TAB as collateral (Pet. Ex. 1).

Metro Bank closed on July 28, 1983. (S.F. 97). When Moore learned of the closing, he told Taylor that he needed to find another bank because of the money he owed and that he would be unable to keep his law practice open unless he obtained monies to pay off his indebtedness at Metro. (S.F. 257). Moore and his accountant assembled a loan package that Taylor then delivered to several banks in order to attempt to secure further financing but to no avail. (S.F. 52; 258-259). Once again, Moore and Taylor contacted Mary and Blanche Taylor. Moore informed them he needed a much larger loan in order to pay off his

existing loans at Metro Bank. (S.F. 259). Thereafter, Moore, Taylor, and Richard Keen, an associate in Moore's office, met with the aunts in Houston. (S.F. 387). At this meeting, Moore brought with him a list of his pending personal injury cases which he had prepared in connection with the loan packages. (Pet. Ex. 2). He proceeded to explain to the aunts that without additional financing he would be unable to continue to work on their nephew's case, even though their nephew's case was probably worth between $50-75 million. (S.F. 392, 280). He assured them that there would be no problem repaying the loan because he had several settlements coming in and that he

had several large cases that would bring in a great amount of money. He presented them the list of his major cases and proceeded to assign each one of them a settlement value. (S.F. 260-263; 349, 387-391). He also assured them that there was no possibility of default because these cases were close to trial and were guaranteed to produce a substantial amount of money for the firm. He also assured them that they need not worry about bankruptcy because a professional corporation could not file for bankruptcy. (S.F. 392). Not once did Moore ever inquire as to whether the aunts had an attorney nor whether they had any knowledge, education or experience in personal injury law. (S.F. 392).

On the basis of these misrepresentations, Mary and Blanche Taylor assisted Moore in obtaining an additional $830,000, over and above the $100,000 loan secured by Mary Taylor's treasury bill, from TAB. This $930,000 loan, which was executed on August 8, 1983, was secured by two certificates of deposits (one valued at $498,000 and the other valued at $432,000) which were held by Mary and Blanche Taylor. (Pet. Ex. 3, 11, 12). He utilized the monies to absolve himself of the $500,000 Metro Bank debt, the original $100,000 note, and to pay off other debts including loans he owed to several individuals. (S.F. 154-155, 267-269). Subsequently, Moore again had

financial difficulties, including the overdrafting of the account into which the loan proceeds had been deposited, once as much as $10,000. (S.F. 269, 365). Moore convinced the aunts to refinance the entire loan at another Houston bank, First City National Bank of Houston. (S.F. 270, 444). The loan was in fact refinanced at First City National in the original principal sum of $1,000,000, secured again by the Taylors' certificates of deposit.

Thereafter, Moore defaulted on the note and the Taylor aunts' CD's were applied against the indebtedness. (S.F. 192).

The State Bar filed a disciplinary lawsuit against Moore alleging specific acts of

professional misconduct. (T. 377). The case was tried to a jury before the Honorable Curt F. Steib. The sole question presented to the jury was whether Moore had engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in his dealings with the Taylor aunts. (T. 409). The jury returned the answer in the affirmative and at a separate hearing on punishment the court entered the sanction of disbarment against Moore.

Moore filed a motion for new trial and an amended motion for new trial. No hearing was held on either motion. The amended motion for new trial was overruled by operation of law. The affidavits of jurors referred to in Moore's

Petition for Writ of Certiorari (Page 9) were not attached to either motion and were never offered into evidence. Moore is, therefore, inaccurate in asserting that the trial court "refused to allow them to be filed." (See Footnote 2, Page 9, Petition for Writ of Certiorari.)

The Court of Appeals affirmed the judgment of the trial court. The Supreme Court of Texas denied Moore's Application for Writ of Error and Moore's Motion for Rehearing of the Application for Writ of Error.

OBJECTION TO JURISDICTION

The Petition for Writ of Certiorari should be denied as Petitioner, Robert Allen Moore (hereinafter called "Moore"), has

failed to establish jurisdiction in accordance with either Rule 10.1(a) or 10.1(b) of the Rules of the Supreme Court of the United States. No federal question was decided by the state court of last resort. The Court of Appeals opinion, set forth beginning on Page 4a of the Appendix to Moore's Petition for Writ of Certiorari, which opinion was affirmed by the Supreme Court of Texas's denial of Moore's application for writ of error, does not address any due process arguments now being asserted by Moore. Rather the points of error involve evidentiary points, the propriety of an instruction given the jury by the judge, and the wording of the jury charge. Moore

asserts due process arguments for the first time in his Motion for Rehearing of the Application for Writ of Error, which was denied by the Supreme Court of Texas on May 6, 1992 (See Page 20a of Appendix to Moore's Petition for Writ of Certiorari.). No new opinion was rendered with the denial of the Motion for Rehearing.

ARGUMENT AND AUTHORITIES

Moore contends that his due process rights were violated because an affidavit which came into evidence constituted new charges against him about which he did not have notice and opportunity to be heard.

In fact, Moore himself first attempted to introduce a portion of

the affidavit during cross-examination of a witness. The affidavit came into evidence in its entirety under Rule 106 of the Texas Rules of Civil Evidence. (See Appendix 1a for text of Rule.) The Supreme Court of Texas, in denying Moore's application for writ of error, found no error in its introduction.

Moore asserts that the introduction of the remainder of the affidavit constituted new charges of which he didn't have notice and about which he did not have an opportunity to be heard.

The affidavit did not constitute "new charges". No trial amendment was sought or granted amending the State Bar's pleading to include

material contained solely in the affidavit. No issue went to the jury which addressed matters "raised" solely in the affidavit. No recitation is found in the judgment which pertains to matters contained solely in the affidavit.

Absent a trial amendment, a jury issue, or a finding in the judgment, it is difficult to see how material contained in an affidavit which properly came into evidence can constitute new charges about which Moore lacked notice and an opportunity to be heard.

None of the cases which Moore cites for the proposition that his due process rights were violated by virtue of introduction of the affidavit stands for the proposition

that introduction of a document alone under such circumstances constitutes a violation of due process.

In In Re Ruffalo, 390 U.S. 544, 88 S. Ct. 122, 20 L. Ed. 2d 177 (1968), for example, the disbarred lawyer argued successfully that his procedural due process rights were denied because the Ohio Board of Commissioners on Grievances and Discipline, after hearing the testimony of both the attorney and another witness, amended its pleading to add an additional charge. This new charge was ultimately one of two charges upon which Ruffalo was disbarred.

In the case at bar, introduction of the affidavit did not constitute

an amendment of the State Bar's pleading.

Similarly, Louisiana State Bar Ass'n v. McGovern, 481 So. 2d 574 (La. 1986), is distinguishable. In that case, a commissioner of the Committee on Professional Responsibility, after hearing evidence relating to certain charges, made recommendations of findings which included violations of rules not pled in the petition. The Supreme Court of Louisiana, charged with reviewing the record of evidence taken, deciding whether misconduct has occurred and what sanction, if any, is appropriate, chose not to consider those violations not contained in the original pleading.

Moore's trial did not result in a finding of rule violations not pled in the petition.

In Louisiana State Bar Ass'n v. Boddie, 534 So. 2d 994 (La. 1988), the court refused to address possible violations of disciplinary rules which had not been pled.

Again, in the case at bar, no new rules violations were pled as a result of the introduction of the affidavit.

The Arizona Supreme Court rejected bar counsel's argument that a lawyer should be disciplined for rules not pled in Matter of Myers, 795 P.2d 201 (Ariz. 1990).

No such argument was made in the instant case.

In another case cited by Moore, the Louisiana Supreme Court in fact rejected a due process argument that a lawyer could not be disciplined for rules not pled, surmising that the rules not pled were in the nature of lesser included offenses to the rules pled. Louisiana State Bar Ass'n v. Keys, 567 So. 2d 588, 591 (La. 1990).

Again, there is no variance between what was pled in the Moore case and what finding was made by the court as a result of the jury's verdict.

Moreover, one of the cases cited by Moore in fact supports the notion that due process was not violated by the introduction of an affidavit into the record.

In Matter of Peterson, 439 N.W. 2d 165 (Iowa 1989), an applicant to take the Iowa Bar examination was denied the opportunity to do so after the Supreme Court of Iowa found that he lacked the requisite moral fitness. Its finding was premised in part upon the affidavit of a former girlfriend whom Peterson had been convicted of assaulting.

Peterson claimed his due process rights were violated by board of law examiners' consideration of the affidavit.

The Iowa Supreme Court disagreed, finding that Peterson had received adequate notice of the nature of the adverse information as he had had access to the materials and had in fact reviewed them prior

to the hearing. Matter of Peterson, 439 N.W. 2d 165, 170 (Iowa 1989).

As it was Moore who initially sought introduction into evidence of a portion of the affidavit, he clearly had prior notice of its existence and contents.

Moore's second argument is wholly without merit. Moore contends his due process rights were violated because he could not introduce evidence of repayment of monies to the Taylor aunts.

This is simply not true. Although a motion in limine was granted preventing Moore from bringing up efforts, if any, of repayment during the jury trial, Moore was given full latitude to put on any such evidence during the

separate hearing on the discipline to be imposed.

Under the State Bar Rules in effect at the time, a jury could make determination of the facts on the basis of which a court would determine as a matter of law whether or not a lawyer had engaged in acts of misconduct; but the court and the court alone could decide the discipline which the attorney was to receive for the misconduct. (See Page 2a of the Appendix for the text of Article X, Section 23, of the State Bar Rules, which was in effect at the time of trial.)

The court in its discretion could hold a separate evidentiary hearing relative to the issue of the appropriate sanction.

The trial court in the Moore case properly entered an order granting a motion in limine prohibiting the offer of any evidence of repayment without first seeking a ruling on admissibility. Whether or not any money was later repaid was irrelevant to what the circumstances were under which the money was taken initially. Such evidence could only be relevant as mitigatory in assessing what sanction should be imposed.

A separate evidentiary hearing was held in the Moore case. Moore had ample opportunity to put on any evidence of repayment he wished to present at that time.

It is, therefore, a misstatement for Moore to assert that he had no

opportunity to be heard on the issue of repayment.

Moore further asserts that the prejudicial effect of disallowing evidence of repayment was exacerbated by the court's allowing evidence to be presented regarding default on the loan. The facts regarding default were pled by the State Bar of Texas. (See Page 6a of Appendix for Third Amended Disciplinary Petition filed by the State Bar of Texas, [S.F. 377-382.].) No special exceptions to this portion of the pleading were made. Nothing was improper in offering and having admitted evidence to support those allegations.

SUMMARY AND CONCLUSION

Moore has failed to properly invoke jurisdiction of this Honorable Court as no federal question was decided by a state court of last resort.

Moore failed to even assert any due process arguments until after the court of appeals rendered its opinion and the Supreme Court of Texas denied application for writ of error, thereby affirming the court of appeals' opinion.

Moore's procedural due process rights were not violated by the introduction into evidence of an affidavit under Rule 106 of the Texas Rules of Civil Evidence. No trial amendment resulted from the introduction of such evidence and no

jury issues or legal findings by the court flowed from the introduction of such evidence.

Moore's procedural due process rights were not violated by the disallowance of introduction of evidence of repayment in the jury trial portion of the proceeding as such evidence was properly excluded as irrelevant and Moore had the opportunity in any event to introduce such evidence at the separate hearing on the sanction to be imposed.

PRAYER

WHEREFORE, PREMISES, ARGUMENTS AND AUTHORITIES CONSIDERED, Respondent prays that Petitioner's Petition for Writ of Certiorari be denied and for such other and

further relief as this Court may deem proper.

Respectfully submitted,

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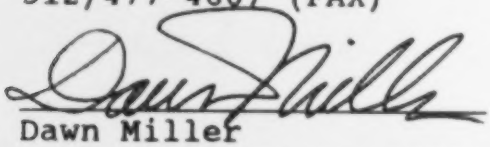

Dawn Miller
State Bar Card No. 15561900

ATTORNEY FOR RESPONDENT

APPENDIX

RULE 106. REMAINDER OF OR RELATED WRITINGS OR RECORDED STATEMENTS.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may at that time introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. "Writing or recorded statement" includes depositions.

ARTICLE X, SECTION 23. JUDGMENT

(A) Determinaton of Misconduct; Sanctions Available. If the court finds from the evidence in a case tried without a jury, or from the verdict of the jury, if there be one, that the respondent's conduct does not constitute professional misconduct, the court shall enter judgment accordingly. If the court shall find that the respondent's conduct does constitute professional misconduct, the court shall determine whether the respondent shall be reprimanded or suspended from practice (in which case the court shall fix the term of suspension not to exceed three (3) years for each separate act of misconduct) or disbarred and the court shall enter a judgment accordingly. If the judgment be one finding that the respondent's conduct constitutes professional misconduct, the court shall direct transmittal of certified copies of the judgment and disciplinary petition to the clerk, and the latter shall make proper notation on the membership rolls.

(B) Sanctions; Relevant Factors. In its discretion, the court may conduct a separate

evidentiary hearing on the appropriate measure of discipline. In determining the appropriate measure of discipline, the trial court shall consider, in addition to any other relevant matters, the nature and degree of misconduct for which the respondent is being disciplined, the seriousness and circumstances attending the misconduct, assurance that those who seek legal services will be insulated from unprofessional conduct, the profit to the attorney or the injury or hardship to others resulting from the misconduct, avoidance of repetition, the deterrent effect upon others, the maintenance of respect for the honor and dignity of the legal profession, and the conduct of the respondent during the course of the investigation and trial of the disciplinary action. In addition thereto, the disciplinary record of the respondent is admissible on the issue of the appropriate measure of discipline to be imposed.

(C) Terms of Judgment; Enforcement. In any judgment of disbarment or in any judgment of suspension for a period of more than ninety (90) days, the court shall order the respondent to

surrender his or her permanent bar card and law license for transmittal to the clerk. In all judgments of disbarment or suspension, the court shall direct that the respondent shall not practice law or represent himself or herself to be an attorney during the period of such disbarment or suspension. The violation of the court's judgment in this regard shall be punishable as for contempt. In all judgments of disbarment, suspension or reprimand, the court may make and enter all such other and further orders as the protection of the public and the respondent's clients may require, including probation of a suspension or a reprimand. In no event shall a court grant a member probation of a suspension or reprimand more than one time.

(D) Restitution. In all cases in which the proof establishes that the respondent's misconduct involved misapplication of client funds and the court determines that suspension is the appropriate measure of discipline, the judgment shall require that restitution be made during the term of suspension and shall provide that failure to do so shall cause the suspension to remain in effect

indefinitely thereafter and until evidence of satisfactory restitution is made by the respondent and is appropriately verified by counsel.

No. 17,508

STATE BAR OF TEXAS	§	DISTRICT COURT
	§	
	§	OF VAL VERDE
	§	
V.	§	COUNTY, TEXAS
	§	
	§	63RD JUDICIAL
	§	
ROBERT ALLEN MOORE	§	DISTRICT

THIRD AMENDED DISCIPLINARY PETITION

Petitioner, the Grievance Committee for State Bar District Number 17B, State Bar of Texas, files this its Third Amended Disciplinary Petition, complaining of Respondent, Robert Allen Moore, showing the Court:

I.

Petitioner brings this disciplinary action pursuant to the State Bar Act, Tex. Rev. Civ. Stat. Ann. art. 320a-1 (1979) and the

State Bar Rules. The acts and conduct of Respondent, as hereinafter described, constitute professional misconduct under the State Bar Rules art. X, §7.

II.

Respondent is an attorney licensed to practice law in Texas and a member of the State Bar of Texas. Respondent is a resident of Ector County, Texas. No service of citation is necessary for the reason that Respondent has answered herein.

FIRST CAUSE OF ACTION

III.

In or around the spring of 1983, Mark Taylor (hereinafter called "Taylor"), an employee and client of Respondent's, was approached by Respondent to see if Taylor could

obtain a line of credit for Respondent's professional corporation to refinance money Respondent's professional corporation had borrowed from Metro Bank. As a result of Respondent's attorney-client relationship with Taylor in representing Taylor's interests in the probation of Taylor's father's estate, Respondent was aware that Taylor had two great aunts, Mary Taylor and Blanche Taylor (hereinafter called the "Taylor aunts"), who would be financially capable of either loaning Respondent's professional corporation funds sufficeint to refinance the Metro Bank loan or fully collateralizing such a loan.

At Respondent's request, Taylor approached the Taylor aunts about utilizing one or more of their certificates of deposits as collateral for a One Hundred Thousand and no/100 ($100,000.00) Dollar loan. Respondent represented that he would be able to pay off the loan, thereby releasing the collateral, with a loan from Metro Bank. Respondent further represented that, if he were unable to secure the loan, he would have to withdraw from representation of Taylor. Based upon said representations, the Taylors put up a Four Hundred Ninety-Eight Thousand and no/100 ($498,000.00) Dollar Certificate of Deposit as collateral

for a One Hundred Thousand and no/100 ($100,000.00) Dollar note dated on or about July 25, 1983, made by Moore & Associates, P.C., payable to the order of Texas American Bank/Houston N.A.

III.

Thereafter, Respondent again sought Taylor's help in approaching the Taylor aunts regarding the utilization of the Taylor aunts' certificates of deposit as collateral for a Nine Hundred Thirty Thousand and no/100 ($930,000.00) Dollar loan with Texas American Bank/Houston N.A., One Hundred Thousand and no/100 ($100,000.00) Dollars of which represented a renewal of the principal due on the

One Hundred Thousand and no/100 ($100,000.00) Dollar loan as Respondent was not able to secure a loan at Metro Bank.

IV.

Subsequently, Respondent met with the Taylor aunts and induced them to utilize their certificates of deposit as collateral for such Nine Hundred Thirty Thousand and no/100 ($930,000.00) Dollar loan by representing them, among other things: (1) that if the loan were not made, Respondent would have to withdraw from representing Taylor because of his financial difficulties in continuing operation of his law firm and that said case would thereby be jeopardized; (2) a

settlement and/or trial value of a number of Respondent's personal injury cases; and (3) that settlement funds sufficient to cover the pay off of the loan would be received prior to maturity of the loan. In truth and in fact, Moore had not received firm settlement offers in any of the cases regarding which he represented settlement values to the Taylor aunts. Moreover, any settlement or trial value Respondent might have placed on a given case would have been purely speculative on his part; therefore the communication of any value to the Taylor aunts on a given case would have been misleading if he intended such valuation to induce

the Taylor aunts to collateralize his loan, which he did. Moore thereby fraudulently induced the Taylor aunts to collateralize his loan. But for the misrepresentations made by Respondent to the Taylor aunts, the Taylor aunts would not have agreed to the utilization of their certificates of deposit as collateral for the loans to Respondent's professional corporation. Such acts and omissions of Respondent as are described in this paragraph are violative of Disciplinary Rules 1-102(A)(1), 1-102(A)(4) and 1-102(A)(6).

V.

The documents evidencing the

Nine Hundred Thirty Thousand and no/100 ($930,000.00) Dollar loan to Moore & Associates, P.C., from Texas American Bank/Houston N.A. were executed on or about August 9, 1983.

VI.

Thereafter the loan was refinanced at First City National Bank of Houston in the original principal sum of One Million and no/100 ($1,000,000.00) Dollars, secured in part by a Four Hundred Ninety-Eight Thousand and no/100 ($498,000.00) Dollar certificate of deposit in the name of Blanche Taylor and a Four Hundred Thirty-Two Thousand and no/100 ($432,000.00) Dollar certificate of deposit in the name of Mary Taylor. In 1984,

Respondent defaulted and the Taylor aunts' certificates of deposit were applied against the indebtedness. Robert Allen Moore and the Law Offices of Moore & Associates, d/b/a Moore and Associates, P.C., filed for bankruptcy. The Taylor aunts learned over the course of the next few months that Respondent's representations regarding trial and/or settlement values of his personal injury cases were false and/or misleading as the cases either settled for less than Respondent had represented that they would settle for or were tried and lost.

VII.

Respondent knew or should have

known that the Taylor aunts, in makng a decision to allow their certificates of deposit to be utilized as collateral, were relying upon Respondent's acting as their grandnephew's attorney, to deal fairly, openly and forthrightly with them. Respondent took unfair advantage of the Taylor aunts' lack of knowledge and expertise regarding the vicissitudes of a personal injury trial practice in representing to them that repayment of the loans by Moore & Associates, P.C., for which they offered collateral was assured by Respondent's personal injury caseload. Respondent further failed to advise the Taylor aunts that they

should seek the advice of their own attorneys regarding the advisability of entering into the loan transactions with Moore & Associates, P.C.; rather, Respondent himself gave advice to the Taylor aunts, who were not represented by a lawyer in the loan transaction, even though the interests of his clients, the borrower, Moore & Associates, P.C., differed from those of a person or persons whose property was being utilized as collateral for the borrower's loan but who received no portion of the loan proceeds. Such conduct violates Disciplinary Rule 7-104(A)(2).

PRAYER

Petitioner prays that upon final

hearing hereof Respondent be REPRIMANDED, SUSPENDED or DISBARRED as the facts shall warrant, and that Petitioner have such other and further relief as may be proper and authorized by law and the State Bar Rules, including all costs of court, and for general relief.

Respectully submitted,

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_____

By: Dawn Miller
State Bar Card No. 15561900

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

This is to certify that the above and foregoing Second Amended Disciplinary Petition has been served on James P. Boldrick, attorney for Respondent, 1801 West Wall, Midland, Texas 79701, by delivery of a true and correct copy to him by certified mail, return receipt requested, by depositing same, enclosed in a postpaid, properly addressed wrapper in an official depository under the care and custody of the United States Postal Service on the 18th day of January, 1990.

_____

Dawn Miller